Victimisation, inspection and workers' entitlements: lessons not learnt?

Glenda Maconachie and Miles Goodwin
School of Management
Queensland University of Technology
GPO Box 2434
BRISBANE 4001

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Contact details: (Glenda Maconachie)
Phone: 07 3138 4266
Fax: 07 3138 1313
Email: g.maconachie@qut.edu.au

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Abstract

19th century Factories and Shops inspectors identified employer victimisation of workers who reported non-compliance with entitlements as a key enforcement problem. Initial strategies of the Australian federal industrial relations inspectorate tasked with enforcing awards and agreements in the 20th century were cognisant of this problem, but more recent strategies appear to have ignored it. This paper examines the impact of shifts in strategies used by the federal inspectorate between 1904 and 2006 in conjunction with changed contextual issues to make two points: complaints- based inspection strategies identify complainants, and combined with changed employment practices increase the potential for victimisation.

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Key words: victimisation, worker entitlements, Australia, labour inspection

Worker entitlements in Australia are enshrined in awards and industrial agreements (both individual and collective) as well as in statues, and have been enforced by government inspectorates and trade unions on behalf of their members. Such enforcement is to check compliance, undertake prosecutions to act as deterrents to non- compliance, and recover unpaid or underpaid entitlements. An implicit assumption in the industrial relations arena is that the checks and balances within the system are adequate, and that employers who evade their obligations to employees are rare. However, this assumption is at odds with a recent detailed examination of the federal industrial relations system in respect of wages and other entitlements (the first of its kind)[1] which shows that employer non-compliance is extensive. Such employer non-compliance may be an outcome

[1] Goodwin & Maconachie, *Unpaid entitlement recovery*; Maconachie & Goodwin, *Recouping wage underpayment*; Goodwin & Maconachie, *Employer evasion of worker entitlements*;

of various factors: resourcing issues within the inspectorate; inspection and prosecution strategies imposed on the inspectorates; general economic circumstances; legislative drafting problems; judicial attitudes to prosecutions; risk-benefit analyses of costs of detection versus cost savings by employers; and the ability of employers to silence complaints by employees by intimidation, victimisation or retribution. Most of these factors have been considered in relation to inspectorates of various types in Australia and elsewhere. The issue of victimisation generally has not, and is the subject of this paper.

In the late 19th century inspectors operating under the Factories and Shops Acts, among the first acts to provide minimum entitlements to workers, discovered the threat of employer victimisation thwarted their enforcement efforts. Factories and Shops inspectorates in Queensland, Victoria and New South Wales were selected as representative of the experience of others in Australia in relation to this matter. Victoria was the first to introduce Factories and Shops legislation in Australia and its legislation influenced other colonies/states. New South Wales and Victoria are also representative on the basis of population and industry size and their political strength. Queensland, with its dependence on primary industries and smaller population, was chosen to provide a contrast with the two larger colonies.

To address the issue of victimisation, both past and present, this paper is divided into 3 sections. The first discusses the issue of employer retribution identified in the 19th century by the Factories and Shops Acts inspectors as impeding the enforcement of minimum standards. The second section highlights

inspection strategies, and shifts in these strategies largely driven by political contexts, between 1904 and 2004 in the federal industrial relations jurisdiction. This section is internally divided into three broad groups encompassing general strategic responses. The third section considers changes in employment practices in recent years that impact upon employee voice in the employment relationship with outcomes in respect of victimisation. In considering these issues, the paper makes two points. The *first* is that shifts in inspection strategy away from routine visits have increased the identification of complainants to employers, potentially increasing the incidence of employer retribution. The *second* is that changed employment practices and environments (growth in precarious employment, increase in individual contracts, changes to union rights and density, altered termination laws and intense competition) have also increased the potential for identification and victimisation of complainants.

Both qualitative and quantitative research and analysis was undertaken to provide the data contained in this paper. Historical research methods have been used to analyse a wide range of primary source materials such as Acts of Parliament, government reports, reports of official enquiries, parliamentary debates, and annual reports of enforcement agencies and government departments. Whilst secondary literature has been drawn upon where possible, the paucity of research on this topic has resulted in primary sources providing the bulk of the data. In respect of the federal Arbitration Inspectorate from the 1970s onward, these sources have been supplemented by semi-structured interviews with former

arbitration inspectors to clarify operational and cultural aspects within inspectorates.

VICTIMISATION AND THE 19TH CENTURY INSPECTORS

While the early Factories and Shops Acts inspectors identified numerous problems with enforcing the new legislation, including judicial attitudes, poor legislative drafting, inadequate penalties, insufficient powers given to the inspectorate, employer hostility to and obstruction of the requirements, and inadequate record keeping, the central problem to enforcing the minimum conditions provided under the Acts lay in obtaining the testimony of victims. This was particularly the case for vulnerable women and young workers. This remained a constant problem from the original *Factories and Shops Act 1886* in Victoria through to the 20th century. Initially the Victorian annual reports argued that, despite many anonymous complaints being lodged, employers would deny the charge and women and junior male employees would not contradict the employer's version of events when questioned. When cases proceeded to court, employees would often break down under cross-examination. By 1893 the situation had deteriorated further and the annual report, for the first time, stated that several girls had been dismissed for providing the court with evidence on work practices instituted by their employers. Although the girls were *subpoenaed* as witnesses, they were dismissed because the employers believed that they had made the original complaint, even though they had not.[2] This employer strategy was summed up by Chief Inspector Ord as 'the man who deliberately breaks the

law is only too glad if his employees clearly understand that to demand their legal rights means dismissal.'[3]

As prosecuted cases received considerable publicity, 'unless possessed of a very clear sense of justice the girls appear to fear nothing so much as being stigmatised as informers.'[4] Public identification as an informer had dire consequences for further employment in the particular industry or area. Faced with the same problem, the New South Wales inspectorate adopted the policy that if underpayment breaches were rectified, prosecutions would not proceed as 'such a course is preferable to placing employees in the witness-box to convict their employer.'[5] Likewise, employer retribution in Queensland created such a situation that 'those critics who look to the number of prosecutions as the standard by which to judge of the efficacy or otherwise of the application of [the Act's] provisions' need to consider.[6] Adopting an optimistic perspective, Victorian Chief Inspector Ord stated that perhaps in the future 'the force of public opinion will enable a girl to proclaim without fear or shame that she took the necessary steps to obtain for herself and her fellow workers the protection given them by an Act of Parliament.'[7]

This optimism did not eventuate as the problem continued unabated in all three jurisdictions. A Brisbane inspector commented that, whilst breaches were detected, 'when the employees think that there is going to be a prosecution they

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[2] Victoria, *Annual Report* 1893, p15.
[3] Victoria, *Annual Report* 1898, p27.
[4] Victoria, *Annual Report* 1893, p15.
[5] New South Wales, *Annual Report* 1899, p12.
[6] Queensland, *Annual Report*, 1898, p10.

inform me that they will have to stick to the employer if they are brought as witnesses.'[8] During 1915/16 Inspector Treal reported that a considerable amount of work involving wage arrears was brought on by employees after they had left their employment, and whilst a few instances were a result of vindictiveness on the part of the employee, the vast majority were *bona fide* cases as the complaint had been delayed 'because of the fear of victimisation' and loss of employment.' [9] The argument which best sums up the situation faced by the employees on this issue was put forward by the Inspector Duncan. She argued that

> It is unjust to place a woman in such a position that she must make an election between telling the whole truth frankly and being dismissed from the factory — thus becoming more or less marked in the eyes of other employers — or evading the truth in order to retain her means of livelihood.[10]

THE INSPECTORATE AND INSPECTION STRATEGIES

1904-1977

In the federal industrial relations jurisdiction, terms and conditions of employment were primarily contained in awards and industrial agreements approved by, and registered with, the Australian Industrial Relations Commission or its predecessors, until 2006. Although established in 1904, the Australian conciliation and arbitration system did not institute a system for monitoring and enforcing awards and industrial agreements until 1934, when the first inspectors were appointed.[11] Consequently, unions provided the only form of enforcement for the

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[7] Victoria, *Annual Report* 1893, p15.
[8] Queensland, *Annual Report* 1908/09, p24.
[9] Queensland, *Annual Report* 1915/16, p44.
[10] New South Wales, *Annual Report* 1899, p2.
[11] Australia, *Parliamentary Debates*, 1934, p1200.

first 30 years of the conciliation and arbitration system, and continue to play a role which is considered later in the paper.

An agency, the Arbitration Inspectorate, was finally established in 1952. Inspectors were required 'to make inspections, examinations, investigations, and enquiries' including interviewing relevant persons, to determine if the Act and its regulations, awards, and determinations were being observed[12] as well as providing an educative role so employers and employees knew their rights and obligations under the Act, awards and determinations. The inspection strategy was documented, and consisted of programmed inspections that were not simply random inspections of federal awards in respondent establishments. On the contrary, inspections were targeted using a variety of techniques to strategically allocate limited resources.

Five general principles underpinned inspections. The first, and arguably the most significant, was based on the size variable. Businesses large enough to employ industrial relations and payroll specialists were considered less likely to breach award provisions and, logically, less likely to require 'guidance' in proper award compliance. Furthermore, such firms were generally unionised workplaces where minor issues were dealt with 'in-house' through the shop steward or delegate, and being generally more 'established' than small businesses were more likely to be familiar with regulations. Despite these factors inspectors were cautioned against leaving large firms un-inspected for long periods.

The second principle distinguished metropolitan areas from rural and

provincial centres as experiences of earlier state factories and shops' inspectors showed that, on a proportionate basis, metropolitan firms were more likely to know and comply with regulations. This was attributed to the activity of State inspectorates in metropolitan areas, and the greater presence of union officials. The third principle was based on the deterrent effect of an inspector 'doing the rounds' in a particular area, and the practical objective of attempting to gain maximum effect with limited resources. Inspecting a strategic sample of workplaces in a particular area, to spread resources across all areas, was the preferred approach. The final two principles centred on awards, and again recognised the experiences of state inspectorates that showed particular awards were more likely to be breached (generally those covering the non-union sectors), and that new awards, being unfamiliar, presented a greater likelihood of noncompliance. The latter situation was to be dealt with in an educative manner whilst a firmer approach was to be adopted in respect of the former.[13]

In addition, inspectors were instructed to prioritise their itineraries according to the type of visit. Investigation of complaints was given top priority, and complaints were handled in the following order: complaints coming through the Minister's office; cases notified as urgent by the State Director; safety matters; complaints from industrial organisations; other signed complaints (sorted by seriousness of alleged breach); and finally, anonymous or unsigned complaints.[14] With itineraries planned to cover all relevant complaints emanating from the area

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[12] Arbitration Inspectorate *Manual*, p7
[13] Arbitration Inspectorate *Manual*, pp8-15.
[14] Arbitration Inspectorate *Manual* p18.

to be inspected, inspectors visited establishments where there was a reasonable likelihood of breaches occurring (based on experience relating to type of work undertaken and frequency that the award was breached). These included new establishments, follow up visits to previously breaching establishments, workplaces not previously inspected, and lastly, previously visited establishments where no breach had been uncovered.[15]

The comprehensiveness of an inspection varied. The inspector was expected to examine all aspects relating to hours and wages but was given discretion to determine whether all employee records would be checked or just a 'spot check' of vulnerable employees undertaken.[16] This decision was usually based on the number of employees at the establishment (and therefore the time required to check all records in a large workplace). However, if the employer had a history of non-compliance or the spot check revealed a breach, the inspector was required to check all records. Further, if the employer's records 'aroused the suspicions' of an inspector, the guidelines encouraged the interviewing of employees to ascertain the correctness of those records.

Although the concept of routine inspections was central to the inspection strategy, by the late 1960s and early 1970s resource restrictions resulted in modifications to this strategy. In particular, the high costs associated with remote area inspections resulted in inspections concentrating almost solely on capital-city metropolitan areas, with limited inspection visits to provincial centres.

[15] Arbitration Inspectorate *Manual*, p17.
[16] Arbitration Inspectorate *Manual*, pp20-21.

Additionally, the 'sample' of workplaces inspected became smaller, the areas covered reduced (particularly rural inspection tours), and the actual inspections became less thorough.[17]

From 1973, increased resources and a decentralisation policy under a Labor government allowed the early principles to again underpin the inspection strategy, and the scope and frequency of rural and regional inspections increased to unprecedented levels. In 1974-75 both the number of establishments inspected and number of employees covered by inspections had increased by approximately 60 per cent over the previous year. Inspections were much more detailed in respect of award entitlements (records of all employees were checked rather than a sample), and re-visits to ensure compliance became more common.[18]

Resource constraints towards the end of the Whitlam government period affected inspection strategy, with thorough inspections replaced by an 'audit' approach concentrating on 'big ticket' award provisions relating to pay and leave entitlements for each employee. Further intensification of resource constraints under the Fraser government affected rural and regional Australia most, although routine inspection programs in metropolitan areas were also curtailed. Programmed inspections became limited to complaints investigation.[19] The inability to base the inspection strategy on the established principles created imbalances on two axes: geographical, with rural and regional Australia virtually excluded from coverage; and compliance history, in that unless a workplace

[17] Arbitration Inspectorate, *Annual Report* 1972; interviews, 1996.
[18] Arbitration Inspectorate, *Annual Report* 1974-75; interviews, 1996.
[19] Arbitration Inspectorate, *Annual Report* 1975-76, p7; interviews, 1996.

generated a complaint it was unlikely to be inspected regardless of its history or the award(s) in force.

1978-1995

In 1978 the Industrial Relations Bureau (IRB) replaced the Arbitration Inspectorate. A review of inspection strategy during 1978-79[20] resulted in the virtual elimination of an inspector's autonomy over what matters to follow up.[21] Additionally, a policy of 'prior notification' from July 1980[22] resulted in inspections by appointment or following written or verbal notice being provided to an employer. This was argued to introduce 'common courtesy,' and increase efficiency by ensuring that the required time and wage records and a person with proper authority would be present at the time of inspection, as well as verifying award respondency.[23]

Although prior notification may increase efficiency in terms of resource expenditure, experienced inspectors argued that it jeopardised overall enforcement effectiveness by warning unscrupulous employers of an impending inspection and provided them with the opportunity to 'cook' the books or suspend or sack underpaid employees.[24] This was of particular concern regarding the more vulnerable workers such as migrant, young, or casual employees. Prior notification also contradicted the International Labour Organisation (ILO)

[20] IRB *Annual Report* 1978-79.
[21] IRB *Operations Manual* 1980, ss 3-3-65 and 3-3-72
[22] IRB *Operations Manual* 1980, s3-3-15.
[23] IRB *Annual Report* 1978-79, p23; IRB *Operations Handbook* 1980, s3-3-15.
[24] Interviews 1996

Inspection Manual[25] which established the parameters necessary to conform with ILO Convention 81 (Labour Inspection). Rather than addressing the underlying problems that led to the adoption of prior notification, the policy served to further reduce inspection strategy effectiveness.

A further departure in inspection strategy concerned the method of inspecting time and wage records. To reduce inspection time, the sampling approach was intensified. As a result the numbers of employees whose work classification and records were checked, and the periods of time to which those records related were all significantly reduced.[26] The procedure for handling complaints also altered under the IRB. Traditionally a complaint would be evaluated initially to determine if it had merit. For example, if a complainant was concerned about wage rates and it could be established during discussions that the correct rate was being paid, then the complaint would not be lodged. Where it appeared that the complainant's concerns had merit, the complaint would be formally lodged and dealt with through a routine inspection. To reduce resources consumed by complaints, the new policy required inspectors to ask whether the employee had attempted to solve the problem with the employer concerned, either directly or through their union. If that had not occurred the IRB 'encouraged' the complainant to discuss the matter with the employer before lodging a complaint. Only when the complaint could not be resolved by the parties, or the complainant refused to confront the employer, would the IRB investigate the matter.[27]

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[25] ILO Inspection Manual, 1986, pp 61-63.
[26] IRB Annual Report 1978-79, p23.
[27] IRB Annual Report 1981-82, p7.

This policy shift undermined a core tenet of minimum labour standards enforcement. Overcoming the imbalance of power in the employment relationship and the likelihood of employer retribution on employees who 'rock the boat' by challenging what is misconstrued as managerial prerogative is central to an effective enforcement strategy. The factories and shops inspectorates of the late 19th century showed that the most vulnerable employees were most likely to face retribution including harassment, exclusion from overtime, being given the least desirable tasks, or the ultimate sanction of being sacked.[28] Bennett[29] notes similar retribution in the 20th century on these issues. It was for these reasons that enforcement techniques such as including the complainant's workplace in a routine inspection and protecting the confidentiality of complainants were developed, preventing the employer from even knowing that a complaint had been made.

The abolition of the IRB on 1 July 1983 returned enforcement to the Arbitration Inspectorate, and restored the traditional inspection strategy and inspector autonomy. However, this was relatively short lived. Numerous influences (such as the OECD's Dahrendorf report, the Business Council of Australia's push for decentralisation of the industrial relations system, and the National Labour Consultative Committee's review of institutional inflexibilities in the Australian labour market) led to a seminal industrial relations policy shift from awards and centralised wage fixation to enterprise level bargaining and agreement

[28] NSW, Annual Reports 1897-1900; Victoria, Annual Reports 1886-1900.
[29] Bennett, *Labour law*

making.[30]

The subsequent decentralisation of the federal industrial relations system had important consequences for enforcement. Under the centralised system awards generally remained valid for long periods and variations were relatively rare, allowing inspectors to gain a thorough understanding of the main awards and clauses most likely to be breached. Furthermore, official wage increases generally resulted from well-publicised decisions of the Industrial Relations Commission, and awards were varied accordingly. This relative stability came under pressure on two fronts as a result of the partial shift to enterprise bargaining in 1988. First, wage increases varied in amount and timing across both awards and workplaces. Second, the conditions traded off in exchange for wage increases varied between workplaces covered by the same award. Inspectors faced a massive increase in the number of award variations, many not applying across the whole award. Tracking these variations required significantly more resources, reducing the amount that could be spent on inspections.

Employee uncertainty linked to enterprise bargaining led to increased levels of complaints, resulting in routine inspections being curtailed to cope. Unlike previous practice, investigation of complaints was undertaken on the complainant's records only, not all employees' records. Over time this practice was further refined so that only the *actual* complaint was checked as opposed to

[30] Macklin, Goodwin and Docherty, *Workplace Bargaining*.

the complainant's full records.[31] Such methods no longer concealed the identity of an employee making a complaint, or even that a complaint had been made.

While the use of routine inspections returned once the backlog of complaints was reduced, it never assumed prominence again. Though initially conducted through workplace inspections, by about 1994 the majority of complaint 'inspections' were conducted by telephone. This was confirmed in new directives[32] which removed any reference to the inspection of workplaces and concentrated solely on an educative approach. The shift from routine inspections to a complaints-based inspection strategy places all the emphasis on employees knowing their entitlements and complaining to the inspectorate. However, in doing so, employee identity is exposed.

1996-2006

In 1997 the Howard government reconstructed the enforcement framework, contracting out much of the award and agreement enforcement activities to State governments.[33] Enforcement responsibilities in Victoria, New South Wales and the Territories remained the province of the new Office of Workplace Services (OWS), a unit within the Department of Employment and Workplace Relations. While outsourcing could have resulted in State inspection strategies being implemented in the federal jurisdiction, contracts with the States specify that the OWS Policy Guide must be followed in relation to compliance and inquiry

[31] Department of Industrial Relations, Annual Reports 1990-91; 1991-92; 1992-93; interviews 1996.
[32] Australia, *Commonwealth Gazette*
[33] Lee, Whatever happened to the Arbitration Inspectorate?, pp341-2.

services provided.[34] The approach to enforcement is reflected in changes to titles: those appointed to perform inspectors' functions are now called Advisors. One significant change is that, rather than pursuing claims on behalf of claimants, under the OWS Policy claimants must generally take action themselves for unpaid or underpaid amounts under $10,000 through the small claims courts.[35] The extent to which workers affected by employer non-compliance are left to 'go it alone' is highlighted in the Department of Employment and Workplace Relations *Annual Report*[36] which notes that 296 of 299 complaints received were resolved through small claims action by workers themselves. Recently a casual employee[37] was 'taken off the roster' for enquiring about incorrect pay. Such cases demonstrate the inherent difficulties for employees in taking such actions against their employers alone. Little wonder workers wait until they have found other employment before attempting to claim their entitlements.

Factors affecting workers' voice

In recent years changes to employment practices and environment have had an impact on both minimum entitlements enforcement and employees' perception of their ability to make complaints regarding employer non-compliance. Four of these significant changes are: growth in precarious employment, increase in individual contracts, changes to union rights and density, and altered termination laws. These are considered briefly below.

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[34] Lee, Whatever happened to the Arbitration Inspectorate?, p342.
[35] Office of Workplace Services, *OWS Policy Guide*, clause 5.3.
[36] Department of Employment and Workplace Relations, *Annual Report* 2002-2003.
[37] New South Wales Industrial Commission, *McNicol and Westco Jeans.*

'Precarious or contingent employment' is an umbrella term that includes a wide range of employment relationships (such as part time, casual, temporary, outwork and labour hire) and accurate estimates of the workforce size of those employed in this manner remain problematic. Quinlan, Mayhew and Bohle[38] noted an overall increase of 43.68 percent in the average proportion of the workforce in precarious employment in Australia and fourteen European Union countries between 1983 and 1999. Although the increased use of these forms of precarious employment has penetrated into the male labour market, females remain disproportionately represented**.** While women constitute a large proportion of the precariously employed workforce, young workers are also significantly represented. Survey evidence suggests that young workers are unaware of work entitlements such as correct wage levels, overtime rates, meal break and the right to a pay slip.[39]

In considering the enforcement of minimum labour standards, precarious employment is an important issue for two main reasons. First, the very nature of precarious employment either directly reduces or negates the regulatory protection of workers, while in other situations it has an obfuscatory effect. Costello[40] found that employers used these forms of employment arrangements 'to reduce, avoid or simply evade legislative and award obligations'. One recently revealed arrangement involved a labourer being appointed as a company director (and thus not an employee of the company) to avoid the union and the enterprise

[38] Quinlan, Bohle & Mayhew, *The global expansion of precarious employment*
[39] Australian Young Christian Workers, *Don't come in today*, p2.

agreement.[41] Sham employment arrangements, specifically designed to disguise an employment relationship in an attempt to circumvent entitlements legally due, create uncertainty for inspectors, making compliance investigation more complex and resource intensive.

Second, and arguably more important, the growth in precarious employment decreases the ability of employees to lodge a complaint whilst in employment. Pocock, Buchanan and Campbell[42] found that on-call and casual employees who voice their concerns on workplace issues are vulnerable to employment termination. Lack of voice on workplace issues has also been reported in relation to casual and low paid female workers.[43] Underhill's[44] research into labour hire workers showed that a substantial proportion of workers believed their jobs were at risk should they raise concerns about working conditions or safety at their workplace. Similar issues have recently been raised in the media in relation to workers operating under Australia's temporary business visa program. A federal parliamentary enquiry[45] into the program raised concerns about the ability of migrant workers on 457 visas to make complaints about their employer or working conditions without fear of their employment being terminated and their being returned to their home country. Even where a person genuinely chooses a precarious form of employment, the underlying

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[40] Costello, *Sanctions and safety nets*, p12.
[41] Hannan, 'Director' free to sue business
[42] Pocock, Buchanan and Campbell, *Securing quality employment*.
[43] Pocock, Prossser and Bridge, *The return of labour-as-commodity?*; Elton et al, *Women and Work Choices*, p64; Ellem, *More work, less choice*, p22
[44] Underhill, *The importance of having a say*.
[45] Australia, *Temporary visas…permanent benefits*, pp 129-131.

characteristics of precarious employment attach a higher premium to making a complaint *vis á vis* a permanent employee. The growth in precarious or contingent employment has the potential to increase the likelihood of non-compliance by employers and decrease the ability of employees to complain due to perceptions of likely employer retribution.

In the Australian context the extent of the role historically ascribed to unions would be roughly equivalent to that of the official regulatory agency. The unions' power to initiate prosecutions for noncompliance with awards and agreements exceeds even their comparative health and safety role (with the exception of the mining industry in some states).[46] However, this role is dependent upon legislative provisions that allow for, *inter alia*, union right of entry to workplaces for inspection purposes, and a right to inspect the records of both members and non-members. In the past union enforcement activity has had a significant influence on the inspectorate, allowing the inspectorate to concentrate on non-unionised sectors where experience showed a greater likelihood of non-compliance. As a result of the abandonment of routine inspections for a complaints-based approach around 1991, the inspection power of unions became even more important. Unfortunately three inter-related issues have reduced unions' ability to carry out this crucial role. First, enterprise or workplace bargaining over agreements lasting up to five years is more time and resource intensive than making multi-employer awards that could last decades. As unions spend more of their limited resources on agreement making their enforcement

activities suffer.

Second, unions can only monitor non-compliance and negotiate on behalf of their members if they have access to workplaces and to time and wage records. Significant restrictions to union rights to access workplaces have been imposed by the *Workplace Relations Amendment (Work Choices) Act 2005*, making it more difficult for officials to meet with union members, to discuss workplace issues with non-members or to police workplace standards.[47] A federal permit to enter workplaces, even for occupational health and safety reasons, is required, as is 24 hours notice to the occupier of the premises. If requiring entry to investigate breaches of industrial instruments, the official must also serve an entry notice on the employer in a form approved by the Australian Industrial Relations Commission, outlining the particulars of the suspected breach. If the breach is related to an Australian Workplace Agreement (AWA), a written request from the member to the union to investigate the breach must also be provided. Once on the premises, the official may inspect and make copies of records relevant to that suspected breach.[48] The legislative requirements to outline suspected breaches clearly identify to employers the workers who have instigated a complaint against them, making them potential targets for retribution. Limitations on access to records outside of the advised alleged breaches require workers to know their entitlements, which survey evidence has shown many do not.[49]

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[46] Bohle and Quinlan, *Managing OHS in Australia*
[47] Elton et al, *Women and Work Choices*, p64; Ellem, *More work, less choice*, p22.
[48] Workplace Authority. *Union right of entry*.
[49] Australian Young Christian Workers, *Don't bother coming in today* ; Elton et al, *Women and Work Choices*.

Third, union membership has fallen significantly in recent years from industry restructuring, changes in employment practices, the effects of the business cycle, social attitudes to unions and the effects of management practices.[50] One management practice, the use of individual contracts, increasingly emphasised in the federal IR jurisdiction since 1996 has the potential to lead to de-unionisation of an organisation.[51] Individual contracts introduce two problems for enforcement: they complicate the relationship between the union and the union member, and regardless of union membership allow the clear identification of a complainant. Individual contracts in themselves have recently been shown to allow victimisation and intimidation of employees, especially through the use of threats and duress to force employees to sign an Australian Workplace Agreement.[52] What actions would result from complaints of non-compliance with that agreement can only be surmised to include similar victimisation and intimidation.

Recent changes in termination law in the federal jurisdiction have implications for permanent as well as precariously employed workers. Employees are technically protected from dismissal in circumstances where they have filed a complaint against their employer or taken part in proceedings against an employer for alleged violations of laws or regulations.[53] Such actions are deemed to be for prohibited or invalid reasons and workers may take legal action. However, at

[50] Bray et al, *Industrial relations*
[51] Hearn Mackinnon, *Clash of the Titans*; Peetz, *Brave New Workplace*
[52] Australia, Federal Magistrates Court.
[53] *Workplace Relations Amendment (Work Choices) Act* 2005, section

approximately $30,000, these are prohibitively expensive for most workers.[54] For workers employed in precarious forms of employment the likelihood of affording such action, or of being in a union which could take action on their behalf, is low. Other employees face similar financial constraints, and with union density declining many are left to their own devices. Thus for many the protection is more illusory than real, providing no deterrent against employee victimisation.

In addition, under the Work Choices Act the termination of employees for 'operational reasons' excludes unfair dismissal actions. A recent report for the Victorian Office of the Workplace Rights Advocate[55] has shown a marked change in the use of operational reasons for terminating employees, leaving the dismissed worker 'with having to show that an employer's purported operational reasons were a sham or contrivance'. The use of this exclusion arguably makes it easier to dismiss workers, including those who have made complaints, if other operational reasons can be raised.

Conclusion

Early Factories and Shops inspectors identified employer retribution against complaining employees as a key issue affecting enforcement. Shifts in inspection strategy from routine inspections to complaints-based investigation clearly allow the identification of the complaining employee to the employer. It is apparent that a strategy relying on a complaint being made to prompt enforcement agency activity can affect the prospects of continuing employment of permanent

[54] Balnave et al, *Employment Relations*, p424.
[55] Forsyth, *Freedom to fire*, pp

employees as well as the most vulnerable groups in the workforce, those in precarious employment. However, the nature of precarious employment often results in the cost associated with making a complaint being considerably higher than for a permanent employee, leaving these workers unemployed in the short term and depending on other circumstances (industry and region), may make them unemployable in the longer term. The more recent strategy of employees having to take action themselves through small claims jurisdictions compounds the issues of identification and vulnerability, leaving this option really only open to workers who have sought other employment. Combined with an emphasis on individual contracts, lower union density rates and reduced union right of entry powers, complaints-based inspection practices make workers who question their entitlements more vulnerable to retribution and victimisation.

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23 September 1996, inspector, approximately 12 years as inspector, left in 1996.

23 September 1996, inspector, approximately 6 years as inspector.

24 September 1996, inspector, ten years experience as an inspector in another field- joined Arbitration Inspectorate in 1985 and left in 1996.

25 September 1996, inspector, approximately 22 years as inspector in both federal and state jurisdictions. In federal system joined Arbitration Inspectorate during Cameron era and early IRB era, then returned after the reformation of the Inspectorate from mid 1980s to 1990.

26 September 1996, senior inspector (including district office manager), joined Arbitration Inspectorate in 1970 and retired in 1995.

15 October 1996, senior inspector (including acting state manager), joined Arbitration Inspectorate in 1985 and left in 1996.

16 October 1996, inspector, joined Arbitration Inspectorate in 1983 became inspector in 1990 and left in 1996.

14 November 1996, inspector and Inspectorate policy officer, four years as an inspector and five years as policy officer during Awards Management Branch era, left in 1996.

20 November 1996, senior inspector, approximately 25 years experience as inspector from 1971.

21 November 1996, senior inspector, approximately 11 years experience.

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